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No. 81-2391

In the Supreme Court of the United States

OCTOBER TERM, 1982

RICHARD J. KNAPP, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the trial court abused its discretion in excluding evidence of defense witness Torina's prior acquittal.

2. Whether the jury instructions were fair and complete.

3. Whether the trial court erred in permitting the government to cross-examine petitioner and his wife about their large cash expenditures and to introduce rebuttal testimony on this subject.

4. Whether the trial judge was fair and impartial in his conduct of the trial.

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OPINIONS BELOW

The district court did not issue a written opinion. The opinion of the court of appeals (Pet. App. 9a-11a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1982. A petition for rehearing was denied by the court of appeals on June 9, 1982 (Pet. App. 12a-13a). The petition for a writ of certiorari was filed on June 29, 1982.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on two counts of filing false federal income tax returns for 1977 and 1978, in violation of 26 U.S.C. 7206(1), and two counts of willfully attempting to evade payment of

federal income taxes for 1977 and 1978, in violation of 26 U.S.C. 7201. Petitioner was sentenced to four concurrent three-year terms of imprisonment, with all but six months of each sentence suspended, to be followed by a probation term of two and one-half years (Pet. App. 6a-8a). In addition, he was fined $5,000 on each of the first two counts, $10,000 on each of the other two counts, and the costs of prosecution of all counts. The fines were concurrent with one another, resulting in a total fine of $10,000 (*id.* at 7a). The court of appeals affirmed petitioner's conviction (*id.* at 9a-11a).

1. The evidence at trial showed that during 1977 and 1978 petitioner was a unit manager for National Broadcasting Company assigned to network broadcasts at locations away from NBC's home base in New York (Tr. 15-16, 23). As a unit manager, petitioner was responsible for coordinating facilities and services needed for the production of television sports programs. Petitioner's duties included procuring goods and services for the television production crew, such as food, rental equipment, and scaffolding (Tr. 17). In anticipation of the need for immediate payment to some vendors, NBC provided petitioner with advances of cash and traveler's checks in amounts as large as $30,000 at a time (Tr. 20-21, 431; GX 6, 14). After a broadcast, petitioner was required to submit a voucher to NBC accounting for his cash expenditures (Tr. 22). The evidence showed that petitioner falsified his travel expense vouchers to cover up large amounts of cash that he retained and spent for his own purposes. Ten witnesses representing eight different vendors testified that petitioner paid them or their firms less than the amounts that petitioner had reported to NBC (*e.g.*, Tr. 77-83, 100-105, 120-121, 126-135). The total by which petitioner inflated his expenditures, based on the testimony of the vendor witnesses, was $10,589.97 in 1977 and $6,410.41 in 1978 (GX 30, 32). Petitioner failed to report any of this income on his federal tax returns (GX 20, 21).

The result was an understatement of tax due by $4,626.79 for 1977 and $2,096.00 for 1978 (Tr. 222-223; GX 31, 33).

2. Petitioner admitted that he had forged or inflated various receipts he had submitted to NBC with his expense vouchers (*e.g.*, Tr. 331, 362-363, 371, 433-434, 493-498, 549). He maintained that he had not used the inflated receipts for his own personal gain, but had incurred expenses in that amount on behalf of NBC (Tr. 439, 485). However, petitioner acknowledged on cross-examination that he had spent large amounts of cash during 1977 and 1978 that could not be traced to any bank account (*e.g.*, Tr. 538-539, 542, 544-547, 763; GX 801). The government demonstrated that the total of checks drawn to "cash" and the cash petitioner alleged he and his wife kept in a metal box was insufficient to cover the expenditures in question (Tr. 759-762, 793-796, 804-806).

3. Petitioner presented five claims of error on appeal, all of which the court of appeals found to be without merit. The court found the evidence sufficient to support the jury's verdict, noting that petitioner himself had conceded in his brief that the inference could be drawn that he had kept the difference between the amounts shown on the vouchers and the amounts actually paid to vendors (Pet. App. 10a). The court found that petitioner had waived most of his claims with respect to the jury charge by failing to object at trial, but that in any event the charge, when taken as a whole, was fair and complete (*ibid.*). The court of appeals concluded that the district court had not abused its discretion in excluding evidence of a prior acquittal of defense witness Torina, describing as "speculative" petitioner's claim that jurors might have drawn certain inferences concerning Torina's credibility (*id.* at 10a-11a). The court of appeals rejected petitioner's claim that the government should have followed special safeguards applicable to the net worth method of proof, since the government had used the specific

item method of proof (*id.* at 11a). Finally, the court of appeals concluded that the trial judge's comments during the course of the trial "were neither so many nor so prejudicial that [petitioner] was deprived of a fair trial" (*ibid.*).

Petitioner sought rehearing, urging the same arguments that he had previously presented. Petitioner produced two affidavits of jurors who stated that their verdicts might have been affected if they had known that defense witness Torina had been acquitted prior to his testimony at petitioner's trial (Petition for Rehearing and Rehearing en banc, Exhibits A and B). The court of appeals denied the petition for rehearing (Pet. App. 12a-13a).

ARGUMENT

The issues raised by the petition concern matters properly entrusted to the broad discretion of the trial court. The decision of the court of appeals reflects a correct application of settled law to the particular facts of the case and raises no question warranting this Court's review.

1. Petitioner contends (Pet. 6-8) that the trial court erred in precluding him from eliciting the fact that defense witness Joseph Torina, a former NBC unit manager, previously had been acquitted of criminal tax charges similar to those brought against petitioner. The trial court granted the government's pretrial motion to preclude such evidence, ruling that "[i]t is obviously wholly immaterial and designed to play on the sympathy of the jury" (Proceedings of Dec. 7, 1981, at 4). The court of appeals correctly concluded that the trial court's ruling was not an abuse of discretion (Pet. App. 10a-11a).

Proffered evidence of an acquittal, even of the defendant himself or a co-defendant, generally is excluded on the ground that it is not relevant to negate an inference of criminal conduct. See, *e.g.*, *United States* v. *Kerley*, 643 F. 2d 299, 300-301 (5th Cir. 1981) (noting that evidence of

a prior acquittal does not prove innocence, but only that the earlier prosecution failed to meet its burden of proving beyond a reasonable doubt at least one element of the crime); *United States* v. *Viserto*, 596 F. 2d 531, 537 (2d Cir.), cert. denied, 444 U.S. 841 (1979). Here Torina's acquittal, even if taken as an affirmative finding of innocence, could have had no bearing on petitioner's guilt or innocence, since petitioner and Torina received separate cash advances, submitted separate vouchers, and filed separate tax returns.

Petitioner contends (Pet. 7), however, that evidence of the acquittal should have been admitted to bolster Torina's credibility. Petitioner argues that jurors may have drawn the adverse inference that Torina, petitioner's former colleague, was about to face a trial on parallel charges, thus motivating Torina to testify falsely on petitioner's behalf in the hope that petitioner would reciprocate at Torina's trial.[1] The court of appeals correctly described this claim as speculative (Pet. App. 10a). Indeed, the government never suggested at trial that Torina had been indicted or that he ever was in any danger of prosecution, so that there was no apparent need to inform the jury of his acquittal. See, *e.g.*, *Harper* v. *United States*, 350 F. 2d 1000, 1001 (D.C. Cir. 1965), cert. denied, 383 U.S. 951 (1966) (upholding exclusion of favorable character evidence of witness's acquittal in case in which defense, not prosecution, had adduced evidence of his arrest and trial); *Perkins* v. *United States*, 315 F. 2d 120, 123 (9th Cir.), cert. denied, 375 U.S. 916 (1963) (upholding exclusion of evidence of witness's acquittal of crimes similar to those alleged against defendant, which had been offered by defense to establish witness's credibility).

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[1]Petitioner never advanced this theory at the trial and, thus, never afforded the trial court an opportunity to modify the ruling petitioner now challenges (Proceedings of Dec. 7, 1981, at 3-5; Tr. 634-635, 814).

Petitioner points to post-trial affidavits of two jurors (Pet. App. 23a-24a), which he submitted to the court of appeals with his petition for rehearing. Petitioner asserts that the affidavits show that the jury would have evaluated Torina's testimony differently if it had known that he had been acquitted. Apart from the manifest impropriety of reviewing an evidentiary ruling on the basis of post-trial and inherently speculative assertions by jurors regarding the possible effect of a different ruling, these affidavits shed no light on the correctness of the challenged ruling. Even assuming the evidence of Torina's acquittal might have had some influence on the jury's assessment of his credibility, this does not show that the influence would have been a proper one. Rule 403 of the Federal Rules of Evidence provides that even relevant evidence may be excluded if its probative value is substantially outweighed by danger of unfair prejudice, confusion of the issues, or misleading the jury. Here, the effect of testimony concerning the acquittal (which we submit was not relevant) would have been to invite the jury to speculate that, since Torina had been acquitted of the same crimes petitioner was then charged with, perhaps petitioner should be acquitted as well.[2] The court of appeals correctly concluded that the trial judge did not abuse his discretion in excluding evidence of the acquittal.[3]

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[2]In fact, petitioner's counsel suggested that Torina's acquittal would be used to argue that petitioner had been treated unfairly (Proceedings of Dec. 7, 1981, at 4).

[3]Petitioner cites *Davis* v. *Alaska*, 415 U.S. 308 (1974), as support for his contention that he should have been allowed to submit evidence of Torina's acquittal (Pet. 7-8). In *Davis* this Court held that the right of the accused to confront witnesses against him required that defense counsel be permitted to question the prosecution's key witness about his adjudication as a juvenile delinquent and his probation status at the time of the events about which he had testified, since such cross-examination might reveal possible biases or motivations of the witness. The present case is totally different from *Davis*. Torina was not an

2. Petitioner contends (Pet. 8-9) that the trial judge's instructions to the jury were erroneous and misleading because they included references to possible embezzlement by petitioner. There is no merit to this contention. The court of appeals correctly concluded that, when taken as a whole, "the jury charge was fair and complete" (Pet. App. 10a). See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973).

The trial judge's references to embezzlement were not a central part of the jury charge, but merely formed a part of its explanation of the term "gross income." The trial judge explained to the jury that one of the issues it had to resolve was whether petitioner failed to report substantial gross income for 1977 or 1978. The judge properly defined the term "gross income" to include not only lawfully received income but also illegal income, such as stolen or embezzled money (Tr. 1011). See *James* v. *United States*, 366 U.S. 213 (1961). He further charged that the key issue on this point was whether petitioner had kept NBC funds for his own use or benefit (Tr. 1012). If he had not done so, he had to be acquitted (Tr. 1018). On the other hand, if he had converted NBC funds for his own personal use, the judge charged, it did not matter whether petitioner had obtained the funds without NBC's approval—which would constitute embezzlement—or with NBC's approval. In either event, the money was taxable income to petitioner if he kept it for his own use (Tr. 1012). The trial judge then defined embezzlement for the jury in a perfectly proper fashion (Tr. 1013-1014). The jury was reminded at several points that petitioner was not on trial for embezzlement and that the government was not required to prove that petitioner had embezzled (Tr.

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adverse witness, but rather was petitioner's own witness; thus, the right to confront an adverse witness is not at issue. Moreover, petitioner sought to introduce evidence of acquittal, not conviction.

1012-1013). The judge made no reference to embezzlement when he summarized the basic elements of the crimes charged (Tr. 1019-1025).

Since the case turned on whether petitioner had taken NBC funds for his own personal use, and since the government contended that he had done so by embezzling, it was clearly proper for the trial judge to refer to "embezzled funds" and to define embezzlement in the course of explaining "gross income." Any confusion that might have resulted from the limited references to embezzlement was eliminated by the judge's clear instruction that petitioner was on trial for violations of federal tax law, not for embezzlement (Tr. 1012-1013). Moreover, the judge repeatedly instructed the jury that petitioner's basic defense was that he had spent the money solely for the benefit of NBC and had kept none of it for himself (Tr. 1014, 1016, 1018, 1022). Petitioner does not contend that these instructions did not fairly and accurately present the defense theory to the jury. There is no question that, taken as a whole, the jury charge was fair and complete.[4]

3. Petitioner argues (Pet. 10-11) that the trial court erred in permitting the government to cross-examine him and his wife about their large cash expenditures during 1977 and 1978 without following the procedures set forth in *Holland* v. *United States*, 348 U.S. 121 (1954). In *Holland*, this Court held, *inter alia*, that if the government chooses to prove income tax evasion by means of the "net worth" method, *i.e.*, by comparison of a taxpayer's reported taxable

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[4]Although the trial judge specifically requested that counsel submit requests to charge on the subject of embezzlement (Tr. 580-581), petitioner did not submit such a request (Tr. 673). Following the jury charge, petitioner's counsel objected to the court's embezzlement charge, but failed to state the ground for the objection (Tr. 1028). See Fed. R. Crim. P. 30.

income with his increase in net worth plus his non-deductible expenditures, it must lay a foundation by establishing the taxpayer's net worth at the beginning of the period in question. In this case, however, the government established violations by proving that petitioner obtained specific items of unreported income, *i.e.*, excess cash retained through submission of falsified expense vouchers, rather than by inferences based upon unexplained increases in his net worth. See *Swallow* v. *United States*, 307 F. 2d 81 (10th Cir. 1962), cert. denied, 371 U.S. 950 (1963). Because this was not a "net worth" case, this Court's holding in *Holland* is inapposite.

Contrary to petitioner's contention (Pet. 10-11), the government did not change its "specific item" case into a "net worth" case by its cross-examination of petitioner and his wife at the trial. The government's direct case consisted of proof of specific items of unreported income received by petitioner. However, when petitioner took the witness stand in his own defense, he testified that the excess cash reflected on the inflated vouchers was used for NBC's purposes and not for his own personal benefit (Tr. 439, 485, 527, 542). To impeach this testimony, the government elicited admissions from petitioner and his wife that they had made unusually large cash payments for personal items in situations in which most people would have paid by check.[5] Petitioner

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[5]The record shows that during 1977 and 1978 petitioner paid for the following items in cash: $14,000 to $15,000 for his own film company; a portion of approximately $11,000 spent for home furnishings; some portion of the expenses incurred during a trip to Bimini; and some portion of a $12,000 down payment on a vacation house (Tr. 533-535, 541-542, 544-547, 790-796, 804-805). Testimony concerning these large cash expenditures also was relevant to the issue of petitioner's willfulness in failing to report income, since the jury could have inferred that petitioner engaged in large currency transactions in order to avoid leaving evidence of unreported income.

responded by claiming that the cash had not come from NBC advances, but from bank accounts and from a cash hoard kept in a metal box (Tr. 535-547, 774-775, 787-788, 794-796). The government then countered that testimony by demonstrating that the total of checks drawn to "cash" and the alleged amounts in the cash hoard were insufficient to cover the expenditures in question (Tr. 759-762, 793-796, 804-806).

The government proved its direct case by establishing specific items of unreported income. The only injection of "net worth" issues came from petitioner's own testimony concerning what he did with the cash available to him. The government then was fully entitled to set the record straight. In doing so the government was not required to employ the special safeguards that are imposed when it bases its direct case on the net worth approach.[6] The court of appeals correctly rejected petitioner's challenge on this point.

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[6]This Court in *Holland* was concerned with cases in which the government seeks to prove tax evasion solely or primarily on the basis of a net worth analysis. In such cases it may be difficult for the taxpayer to refute the circumstantial evidence presented by the prosecution. 348 U.S. at 129. Courts have declined to impose the "exceptional safeguards" set out in *Holland* in cases that are not based solely on the net worth method. See, *e.g.*, *United States* v. *Suskin*, 450 F. 2d 596, 598 (2d Cir. 1971) (*Holland* safeguard need not have been applied where government's method of proof was by specific item); *Taglianetti* v. *United States*, 398 F. 2d 558, 564-566 (1st Cir. 1968), aff'd, 394 U.S. 316 (1969) (declining to require strict adherence to *Holland* safeguards even when government had used the cash expenditure method of proof, a variation on the net worth method); *Swallow* v. *United States*, *supra*, 307 F. 2d at 84 (reasons for application of *Holland* safeguards are not present in "specific item" case); *United States* v. *Nunan*, 236 F. 2d 576, 585-586 (2d Cir. 1956), cert. denied, 353 U.S. 912 (1957) (*Holland* safeguard not required in non-net-worth case, even though evidence of cash expenditures had been introduced). See also *United States* v. *Londe*, 587 F. 2d 18, 20 (8th Cir. 1978), cert. denied, 439 U.S. 1130 (1979). Moreover, courts have not imposed such safeguards in admitting evidence of large cash expenditures by defendants in non-tax cases, in which such evidence constitutes only part of the overall proof of a

4. Finally, petitioner contends (Pet. 12) that the trial judge deprived him of a fair trial by asking questions and making comments that damaged the credibility of petitioner and other defense witnesses. The record as a whole does not bear out this charge.

A federal judge "is more than a moderator or umpire and has an active responsibility to see that a criminal trial is fairly conducted." *United States* v. *Curcio*, 279 F. 2d 681, 682 (2d Cir.), cert. denied, 364 U.S. 824 (1960). Thus, a judge has the power and the responsibility to elicit the truth through the interrogation of witnesses. *Glasser* v. *United States*, 315 U.S. 60, 82 (1942). Indeed, the judge may even express his opinion on the weight of the evidence and the credibility of the witnesses, so long as he makes clear that the jury is in no way bound by such observations. See *United States* v. *Davis*, 546 F. 2d 617, 622 (5th Cir. 1977); *United States* v. *Aaron*, 190 F. 2d 144, 146-147 (2d Cir.), cert. denied, 342 U.S. 827 (1951). Of course, the trial judge must also maintain impartiality and a courtroom atmosphere in which guilt or innocence may be fairly tested. See *Glasser* v. *United States, supra*, 315 U.S. at 82-83; *United States* v. *Price*, 623 F. 2d 587, 593 (9th Cir.), cert. denied, 449 U.S. 1016 (1980).

It is necessary to examine the record as a whole in order to determine whether the trial judge's participation affected petitioner's substantial rights. *Glasser* v. *United States, supra*, 315 U.S. at 83. The trial in this case consumed six trial days and more than one thousand pages of transcript.

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crime involving a motive of financial gain. See, *e.g.*, *United States* v. *Falley*, 489 F. 2d 33, 39-40 (2d Cir. 1973) (distinguishing net worth tax fraud cases on the ground that the government relies exclusively on inference drawn from financial evidence in such cases); *United States* v. *Crisp*, 435 F. 2d 354, 360 (7th Cir. 1970), cert. denied, 402 U.S. 947 (1971); *United States* v. *Robinson*, 635 F. 2d 981, 987 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981).

Not only were the trial judge's interjections relatively few and far between, but, as petitioner's own illustrations reveal (Pet. 12-14), they generally were geared toward insuring that witnesses were responsive to questions asked by counsel.[7] The trial judge carefully instructed the jury that none of his rulings or questions was to be interpreted as indicative of his opinion concerning the guilt or innocence of the petitioner and that this matter was the responsibility of the jury only (Tr. 994). Moreover, the strength of the evidence of petitioner's guilt renders harmless any error that might have

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[7]The examples cited by petitioner are taken out of context, as he concedes (Pet. 12). One example suggests the motivation underlying the occasional intervention by the trial judge. Petitioner and defense witness Koiv testified at trial that they had to inflate their receipts to receive credit for "non-voucherable" expenditures they purportedly had made on NBC's behalf (Tr. 248-274, 352-358, 372-375). They contended that there were many types of expenditures that NBC wanted and expected them to make, such as payment for liquor and entertainment, but which they were not allowed to list explicitly on their vouchers (Tr. 256, 261, 418, 423). NBC management allegedly knew and approved of the forging and inflating of receipts to cover such "non-voucherable" expenditures (Tr. 248-249, 470-471). The record shows, however, that the types of expenditures that petitioner described as "non-voucherable" were in fact routinely accepted for payment by NBC (Tr. 504-529). The questions and comments reproduced in the petition (at 12-13) represent an understandable attempt by the judge to clarify this important testimony for the jury.

Petitioner complains (Pet. 14) that the trial judge showed bias by making thirty sua sponte rulings which precluded questioning by defense counsel and only five such rulings against the prosecution. This fact standing alone does not show bias. Rather, the record reveals that the disparity resulted not from any partiality on the part of the judge, but from the more frequent asking of objectionable questions by petitioner's counsel. In addition, petitioner fails to note the instances in which the judge expressed displeasure at government witnesses and at the prosecution (*e.g.*, Tr. 40, 41, 94-95, 237, 712, 715, 887). The judge treated both sides even-handedly and gave petitioner the benefit of significant discretionary rulings (Tr. 228, 766, 884-885, 911).

occurred.[8] See *United States* v. *Robinson*, 635 F. 2d 981, 986 (2d Cir. 1980), cert. denied, 451 U.S. 992 (1981); *United States* v. *Price, supra*, 623 F. 2d at 593.

The court of appeals carefully reviewed petitioner's claim and concluded that, while some of the trial judge's comments would better have been left unsaid, they were "neither so many nor so prejudicial that [petitioner] was deprived of a fair trial" (Pet. App. 11a). That conclusion is clearly correct, and no further review is warranted.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[8]As the court of appeals noted (Pet. App. 10a), petitioner all but conceded that the evidence was sufficient to support the jury's verdict.

[9]There is no basis for petitioner's contention (Pet. 12) that the decision below conflicts with *Quercia* v. *United States*, 289 U.S. 466 (1933). In *Quercia*, this Court held that the trial judge's instruction to the jury that the defendant's wiping his hands while testifying was "an indication of lying" constituted reversible error. Petitioner points to nothing in the present case that even approaches the instruction at issue in *Quercia*.

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